

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32

(Hayward, CA)

TREE OF LIFE, INC., d/b/a  
TREE OF LIFE GOURMET AWARD  
FOODS WEST<sup>1</sup>

Employer

and

Case 32-RC-4646

WAREHOUSE UNION LOCAL 6,  
INTERNATIONAL LONGSHORE &  
WAREHOUSE UNION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer, a Delaware corporation with an office and place of business located in Hayward, California, the only facility involved herein, is engaged in the wholesale warehousing and distribution of gourmet and natural food products. During the course and conduct of its business operations, the Employer annually purchases and receives goods valued in excess of \$50,000 directly from suppliers located outside the State of California. Based upon the above, I find that the Employer is engaged in commerce within the meaning of the Act and that its operations meet the Board's standard for non-retail operations. Accordingly, the assertion of jurisdiction over the Employer is appropriate herein.

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<sup>1</sup> The name of the Employer appears as stipulated to by the parties.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer is engaged in the wholesale warehousing and distribution of gourmet and natural food products to retail customers in the States of California, Nevada, and Utah. The products carried by the Employer are received and stored at its large Hayward warehouse and then delivered to customers by its truckdrivers, or in some cases by common carriers. The parties are in agreement as to which warehouse classifications are to be included in the unit herein. However, the Employer, contrary to Petitioner, contends that the truckdrivers and the two transportation department clerks, the transportation clerk and the transportation coordinator, must be included in the unit based upon the integrated nature of the Employer's operations. Petitioner, on the other hand, asserts that a unit limited to warehouse employees is an appropriate unit even if it is not the only appropriate unit.

There are 21 truckdrivers, also referred to herein as drivers, 13 of whom drive local routes, i.e. up to about 150 miles from the Hayward warehouse. The local drivers work shifts running from 5:00 a.m. to 5:00 p.m. Monday through Friday. The long haul drivers either drive to the Los Angeles area in 20-hour roundtrips or to Salt Lake City, Utah, in 48-hour roundtrips. All of the drivers are required to possess Class A commercial driver's licenses issued by the State of California as well as medical certificates required by the U.S. Department of Transportation. They are subject to random drug testing as required by the D.O.T. Although the tractors utilized vary according to whether the route is local or long haul, all of the truckdrivers are qualified to drive all of the Employer's equipment. The drivers, who are required to have prior experience before being hired, are interviewed by the dispatcher and the transportation manager, with the final decision being made by the manager. The transportation manager must also approve any discipline of truckdrivers. Similarly, the transportation manager is responsible for the hiring for the two clerical positions in the transportation department, as well as any discipline. He has no such authority over warehouse employees. The two clerks are hourly paid. However the drivers are paid by a combination of a set fee for each customer stop, a mileage rate, and a standby hourly rate if held up for more than an hour. The drivers fill out time sheets, which are verified by the clerks. On an annual basis, the drivers earn from \$42,000 to \$55,000. The drivers who have local routes report to the warehouse at 5:00 a.m. and spend about 15 minutes going over their invoices and checking the load before departing. They spend about 30 minutes at the warehouse at the end of the day going over paperwork. The long haul drivers spend about one

hour at the facility going over invoices and checking their loads before going on their 20 or 48 hour roundtrips. In the regular course, all of the trailers are loaded by warehouse employees before the drivers report for work. Some of the long haul routes start on Saturday or Sunday. On some infrequent occasions a driver may work with a warehouse employee to reconfigure a load if there is an exception to the predetermined load plan. On rare occasions a warehouse employee may ride along with a local driver if a load is particularly heavy or if the trailer was loaded late. On such occasions the warehouse employee assists with the unloading of goods at the customer's premises, not with the driving. Ordinarily the driver does all of the unloading.

Benefits, including vacations, 401(k), and health benefits, are identical for warehouse employees and truckdrivers. In addition, there are common break rooms for all employees and any company-wide social events are open to all employees. Truckdrivers, on the other hand, are required to wear a company-provided uniform consisting of a shirt with the company logo on it. Warehouse employees are free to wear such uniform shirts but are not required to do so. Warehouse employees punch a timeclock and are paid hourly wages ranging from \$8.00 to \$12.00, which computes to annual earnings of about 50% of the annual earnings of the truckdrivers. Although subject to preemployment physicals and drug testing, the warehouse employees are not subject to random drug testing as are the drivers and are not required to have current D.O.T. approved medical cards. The only certifications required for certain warehouse employees are certificates that they have taken safety courses provided by the manufacturers of some of the equipment used in the warehouse. No other licenses are required.

As set forth above, the drivers are supervised by the dispatcher and the transportation manager while the warehouse employees are supervised by the six production supervisors and the warehouse manager. From time to time, the production supervisor in charge of the loading dock will direct a truckdriver to relocate a trailer in order to facilitate loading. This alone is insufficient to establish common supervision of warehouse employees and truckdrivers inasmuch as the direction appears to be routine in nature. Further, the truckdrivers spend only a very small part of the workday at the warehouse in any event. The warehouse manager makes all final decisions on hiring and discipline of warehouse employees. Neither he nor any of the production supervisors are involved in the hiring or discipline of drivers.

The sole issue herein is whether the truckdrivers must be included in the warehouse employee unit sought by Petitioner. In *E.H. Koester Bakery Co.*, 136 NLRB 1006 (1961), the Board reversed its prior policy of automatically including truckdrivers in more comprehensive units absent agreement of the parties. The Board went on to state that it would decide the unit placement of truckdrivers in each case upon a determination of their community of interests. Since *Koester*

the placement of truckdrivers in plant units have depended on the following factors:

- (1) Whether the truckdrivers and the plant employees have related or diverse duties, the mode of compensation, hours of work, supervision, and other conditions of employment; and;
- (2) Whether the truckdrivers are engaged in the same or related processes or operations, or spend a substantial portion of their time in such production or adjunct activities.

It is clear from the above that the truckdrivers have substantially separate interests from the warehouse employees. See, *Pacemaker Mobile Homes, a Division of Lonergan Corp.*, 194 NLRB 742 (1972). Accordingly, at the request of Petitioner I shall exclude them from the unit found appropriate herein. In this regard it should be noted that in *Marks Oxygen Co.*, 147 NLRB 228 (1964) the Board clarified its ruling in *Koester* to state, among other things, that the decision in that case was not meant to reverse basic policies such as the fact that a petitioner's desires is always a relevant consideration and that it is not essential that the unit be the most appropriate unit. See, *Lundy Packing Company, Inc.*, 314 NLRB 1042, 1043 (1994).

At the hearing the Employer made reference to a prior petition involving the Hayward facility in which the truckdrivers were included in a comprehensive unit. A review of the Region's files discloses that the petition in Case 32-RC-4300 was filed by a different labor organization on May 16, 1997. Petitioner initially sought an election among warehouse employees only. However, the parties subsequently entered into a stipulated election agreement with my approval which included drivers. No election was held inasmuch as the petition was dismissed based upon an inadequate showing of interest. It is well established that any bargaining history based upon stipulated election agreements is not controlling on the Board. *Mid-West Abrasive Co.*, 145 NLRB 1665 (1964); *Macy's San Francisco*, 120 NLRB 69, 71 (1958). Here, not only was the broader unit agreed upon in a stipulated election agreement, no bargaining history resulted since the petition was thereafter dismissed. In these circumstances the stipulated election agreement in Case 32-RC-4300 is entitled to no weight in resolving the scope of unit issue herein.

Inasmuch as I am excluding the truckdrivers from the unit found appropriate herein, I shall also exclude the transportation clerk and the transportation coordinator. Although each of the individuals regularly occupying those positions does not do any driving, neither do they physically handle the goods in the warehouse. A temporary employee on the payroll of another employer is filling in for the regular transportation coordinator while she is on workers' compensation leave. The temp has been trained to load outbound common carrier shipments during the day. However, neither party would include the temp in the bargaining unit. Further, the regular transportation coordinator

did not do any loading work prior to going on leave and will not do any loading upon her return to work, which is scheduled for about four weeks from the date of the hearing. Although not reflected in the Employer's brief, the Employer's sole witness, the Transportation Manager, testified on the record that the permanent transportation coordinator did not do any loading work prior to going on leave and will not do any when she returns to work. Also, the transportation clerk does not do any loading work. In a further mischaracterization of the record the Employer asserts that the transportation clerk and the transportation coordinator work in the warehouse as shown on the schematic drawing of the Hayward facility received into evidence at the hearing. First of all, the entire record reflects that the transportation clerk and the transportation coordinator work with the dispatcher in the operations department office. According to the schematic prepared by the Employer, all of the offices are located within the confines of the two adjacent warehouse buildings. These offices include the main office and the operations department, which are located in one of the buildings, and the sales office, the production office, and the credit department, which are located in the other building. There are no separate office buildings at the Hayward facility. It is also clear from the record that the transportation clerk and the transportation coordinator share the same supervision as the truckdrivers, i.e. they are supervised by the dispatcher and the Transportation Manager. Based upon the above and a reading of the entire record, I conclude that the transportation clerk and the transportation coordinator do not share a sufficient community of interests with the warehouse employees to require their inclusion in the petitioned-for unit.

The parties' briefs have been carefully considered. The only case cited by the Employer that bears any discussion is *Genuine Parts Co.*, 269 NLRB 1052 (1984). That case involved an employer which was engaged in the warehousing and distribution of automotive supplies. The petitioner sought a unit limited to warehouse employees at the main facility, excluding, among others, jobber drivers. However, the facts in that case are critically dissimilar from those in the instant case. Thus, the jobber drivers spent a substantial amount of time each work day at the warehouse doing the same work as the warehouse employees. Further, the jobber drivers and 70% of the petitioned-for warehouse employees were commonly supervised. In addition, the jobber drivers were hourly paid as were the warehouse employees, and their wage rates were similar. Lastly, the administration of the employer's operations was highly centralized so that the single plant presumption relative to the warehouse was overcome. Under those circumstances the Board found only an overall unit appropriate, including not only jobber drivers but employees at company-owned stores as well.

Here, in contrast to the case relied upon by the Employer, the drivers spend only a small portion of their long work days at the facility. Indeed, it appears that some of the long haul drivers begin their runs over the weekend when no warehouse employees are on duty. Significantly, as discussed above, the drivers are paid on a totally different basis than the warehouse employees

and their annual earnings are almost twice as much as those of the warehouse employees. Even the bonuses which the Employer points to in its brief as a common benefit, are completely different for the two groups of employees. The drivers' bonuses are computed quarterly based upon their individual safe driving records and productivity while the bonus for warehouse employees is computed annually based upon the productivity of the warehouse. Another significant difference between the two cases is that here the record establishes that the Transportation Manager has hiring, firing, and disciplinary control over the drivers, the transportation clerk and the transportation coordinator, and the Warehouse Manager has similar authority over the warehouse employees. In *Genuine* such authority was centralized above the level of the immediate managers.

Inasmuch as all of the evidence disclosed at the hearing clearly establishes that the drivers along with the transportation clerk and the transportation coordinator have a substantially separate community of interest from the warehouse employees, applying the *Koester* rule I shall exclude them from the unit.

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time warehouse employees employed by the Employer at its 3771 Arden Road, Hayward, California 94545, facility, including all pickers, stockers, shipping and receiving clerks, inventory control employees, dock employees, machine operators, fork lift operators, janitors, maintenance employees, and other warehouse employees; excluding all truckdrivers, the transportation clerk, the transportation coordinator, guards, and supervisors <sup>2</sup>as defined in the Act.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. <sup>3</sup> Eligible to vote are those in the unit who are employed during the

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<sup>2</sup> At the hearing the parties stipulated, and I find that the following named individuals are supervisors within the meaning of Section 2(11) of the Act : Greg McKee, Division Manager; Kerry Roberts, Director of Operations; Craig Cole, Transportation Manager; Todd Ford, Warehouse Manager; Blake Johnson, Dispatcher; Dennis Debardeleben, Training Supervisor; and Dan Drown, Mike Minemoto, Sai Faaifo, Denny Leyton, Mark Lampe, and Tedd McRice, Production Supervisors. Accordingly, I shall exclude them from the unit found appropriate herein.

<sup>3</sup> Please read the attached notice requiring that election notices per posted at least three (3) days prior to the election.

payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHORE & WAREHOUSE UNION, AFL-CIO.

#### LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361, fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before July 23, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by July 30, 1999.

Dated at Oakland, California this 16th day of July, 1999.

/s/ James S. Scott

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